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ARTICLES

THE LOST CONTROVERSY LIMITATION OF THE FEDERAL ARBITRATION ACT

Stephen E. Friedman *

Despite Congress's deliberate limitation of the Federal Arbitration (the "FAA") to disputes arising out of a contract containing an arbitration provision, broader arbitration provisions are ubiquitous. Courts invariably enforce such provisions under the FAA. Notably, the Supreme Court has almost entirely disregarded the relevant language of the FAA and has ignored the conflict between the FAA's narrow language and the broad language typically found in arbitration provisions. In so doing, the Court has quietly and inappropriately elevated the language of private agreements above the language of the statute.

In this article, Professor Friedman first identifies the origin of the Court's disregard for the FAA's language. Second, he describes the conflict between the narrow language of the statute and the broad language found in arbitration agreements. Third, Professor Friedman describes and critiques both the judicial disregard of this conflict and the corresponding expansion of the FAA's scope. Finally, he urges courts to focus on the language of the FAA to limit the statute's scope to only those controversies that Congress intended.

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The Supreme Court has elevated private arbitration agreements above the primary statute that governs them. This empowering of private parties at the expense of Congress has resulted in a proliferation of extremely broad arbitration provisions. An arbitration provision enforced in a recent case is illustrative. A provision in an employment contract compelled the parties to arbitrate "any legal or equitable claim, demand, or controversy, whether in tort, in contract, or under statute which relates to, arises from, concerns, or involves [the employment] in any way."[1] For good measure, the provision also required the arbitration of "any other matter related to the relationship between the Employee and the [employer], including, by way of example and without limitation, allegations of prohibited forms of employment discrimination such as discrimination based on race, religion, color, sex or age."[2] Such a provision is certainly broad enough to cover alleged violations of federal and state statutes. Accordingly, when a fired employee sued for violation of the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, and the New Mexico Human Rights Act,[3] the court enforced the arbitration provision under the Federal Arbitration Act (the "FAA"),[4] staying the litigation and compelling the parties to arbitrate.[5]

While the claims were surely within the extremely broad arbitration clause, they were also well outside the scope of the FAA. The court did not discuss the possibility that the controversy was beyond the FAA's scope, nor, apparently, did the former employee argue the point. Such silence is a function of jurisprudence that has almost completely written out key language restricting the FAA's scope. The language the Supreme Court has largely ignored is the statute's limitation to arbitrate a controversy only if it "aris[es] out of" a contract with an arbitration provision or "aris[es] out of" the failure to perform that contract.[6] The author refers to this as the FAA's "controversy limitation." This article challenges the judicial disregard of the controversy limitation.

1. Parrish v. Valero Retail Holdings, Inc., 727 F. Supp. 2d 1266, 1269 (D.N.M. 2010).
2. *Id.* at 1269–70.
3. *Id.* at 1270 (citations omitted).
4. 9 U.S.C. §§ 1–16 (2006).
5. *Parrish*, 727 F. Supp. 2d at 1281–82 (citing 9 U.S.C. §§ 3–4; Adair Bus Sales, Inc. v. Blue Bird Corp., 25 F.3d 953, 955 (10th Cir. 1994)).
6. 9 U.S.C. § 2.

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The matter is of great significance. Arbitration provisions that exceed the scope of the FAA are quite common, and it is often the party with superior bargaining power, such as an employer, who insists on such a provision. The arbitration provision described above is quite typical.[7] Courts invariably enforce such broad provisions, resulting in a massive expansion of the FAA both outward, to include all manner of statutory claims, and inward, to include disputes over the arbitration provision itself.

This expansion is very much at odds with the language and legislative history of the FAA, both of which make clear that Congress intended the FAA to apply only to contract disputes arising out of an agreement that contains an arbitration provision. The origin of this expansion is somewhat surprising, lying as it does in early Supreme Court jurisprudence that resisted an expansive scope for the FAA. The relevant cases based their resistance on skepticism towards arbitration. Had those earlier decisions been based instead on the language of the FAA and the congressional intent it reflected, the FAA's scope might be far more modest—and consistent with congressional intent—than it is today.

This article proceeds as follows. Part I provides some basic background on the FAA and its four limitations, which the author refers to as the "form limitation," the "constitutional limitation," the "state law limitation," and, of course, the controversy limitation. It also describes the conflict between the language and scope of the FAA and the language and scope of typical arbitration provisions. Part II discusses some early resistance to the current broad scope of the FAA. It then analyzes the Supreme Court's more recent practice of ignoring the language of the FAA and deferring to the broader language in arbitration provisions. Part III critiques that practice, presenting the argument that Congress intended only contract disputes arising out of the underlying contract to fall within the scope of the FAA. Finally, Part IV identifies and addresses various objections to the argument that courts should adhere to the language of the controversy limitation in order to effectuate the intent of Congress.

7. *See* discussion *infra* Part I.D.

I. BACKGROUND ON THE FAA AND ITS FOUR LIMITATIONS

A. *A Brief History of the FAA*

The FAA applies both to agreements to arbitrate disputes that might later arise (i.e., "pre-dispute arbitration agreements") and to agreements to arbitrate existing disputes.[8] This article addresses only pre-dispute arbitration provisions. Prior to the passage of the FAA and similar state laws, courts were often quite hostile towards the enforcement of such pre-dispute arbitration agreements. This hostility took two basic forms. First, courts typically permitted either party to a contract to revoke a pre-dispute arbitration agreement any time before the arbitrators issued an award.[9] Second, even if arbitration provisions were deemed valid, courts were reluctant to enforce them in equity and typically refused either to stay litigation or to compel the parties to proceed in arbitration.[10]

A number of explanations for this hostility have been proposed. Courts may have been hesitant to enforce arbitration agreements that would "oust the jurisdiction" of the courts in favor of arbitrators[11] (a rationale that was derided as illogical[12] and unworthy of judicial adoption[13]). Judicial resistance to arbitration may have been based on a concern that stronger parties would take advantage of weaker parties and compel them to "sign away their rights," thus "tak[ing] away the rights of the weaker" parties.[14] Or it may simply have been that courts felt constrained to follow precedent even if they disagreed with, or no longer knew, the rea-

8. 9 U.S.C. § 2.

9. *See, e.g.*, Southland Corp. v. Keating, 465 U.S. 1, 32 (1984) (O'Connor, J., dissenting).

10. *See, e.g.*, S. REP. NO. 68-536, at 2 (1924) ("[I]t is very old law that the performance of a written agreement to arbitrate would not be enforced in equity, and that if an action at law were brought on the contract containing the agreement to arbitrate, such agreement could not be pleaded in bar of the action . . . .").

11. *See, e.g.*, Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 983–84 (2d Cir. 1942) (quoting Kill v. Hollister, (1746) 95 Eng. Rep. 532 (K.B.); 1 Wils. K.B. 129) (internal quotation marks omitted).

12. *Id.* at 985.

13. U.S. Asphalt Ref. Co. v. Trinidad Lake Petrol. Co., 222 F. 1006, 1007 (S.D.N.Y. 1915).

14. *See Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 15 (1924) [hereinafter *Joint Hearings*] (statement of Julius Henry Cohen, General Counsel, New York State Chamber of Commerce) (internal quotation marks omitted).

soning behind it.[15] Whatever the reasons for such judicial hostility, it was firmly entrenched in the early twentieth century.[16]

The business community led a concerted effort to eliminate this judicial hostility towards pre-dispute arbitration provisions.[17] The 1920 passage of an arbitration statute in New York State[18] was a major victory. Under the New York Arbitration Law, a "provision in a written contract to settle by arbitration a controversy thereafter arising between the parties . . . shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."[19] Further, the New York statute provided a mechanism for the specific enforcement of arbitration provisions. The law empowered—actually it required—a court to stay litigation of issues that were referable to arbitration under the parties' agreement.[20] Similarly, the law empowered and required a court to enter an order that arbitration proceed if the court was satisfied that the parties had made an arbitration agreement and that one of the parties had failed to comply with the agreement.[21] New Jersey followed suit in 1923,

15. *See, e.g.*, *U.S. Asphalt Ref. Co.*, 222 F. at 1007, 1009–10, 1012 (sharply criticizing the rule of revocability but upholding it due to the rule's firmly settled nature); Berkovitz v. Arbib & Houlberg, Inc., 130 N.E. 288, 292 (N.Y. 1921) (citations omitted) (noting that judicial hostility has been criticized by many courts who nonetheless felt bound to express similar hostility "in deference to early precedents"); Henry v. Lehigh Valley Coal Co., 64 A. 635, 636 (Pa. 1906) (noting that it was "much to be regretted that agreements to arbitrate . . . should be excepted from the general law of contracts and treated as revocable by one party without consent of the other" but upholding the rule of revocability as "too firmly settled to be changed without legislative authority").

16. *See* WESLEY A. STURGES, A TREATISE ON COMMERCIAL ARBITRATION AND AWARDS 45 (1930) (noting that the hostility towards pre-dispute arbitration provisions was "almost universally accepted by the American courts").

17. *See* Harry Baum & Leon Pressman, *The Enforcement of Commercial Arbitration in the Federal Courts*, 8 N.Y.U. L.Q. REV. 238, 247–48 (1931) (describing efforts of the business community to ensure passage of legislation favoring arbitration); W.H.H. Piatt et al., *The United States Arbitration Law and Its Application*, 11 A.B.A. J. 153, 153 (1925) (noting that the bill that became the FAA "was supported by business organizations from every part of the country").

18. *See* J.P. Chamberlain, *The Commercial Arbitration Law*, 9 A.B.A. J. 523, 524 (1923) (citing An Act in Relation to Arbitration, Constituting Chapter Seventy-Two of the Consolidated Laws, 1920 N.Y. Laws 803).

19. New York Arbitration Law § 2 (1920), *reprinted in* A TREATISE ON COMMERCIAL ARBITRATION AND AWARDS, *supra* note 16, at 92 (footnote omitted) (internal quotation marks omitted) (current version at N.Y. C.P.L.R. § 7501 (CONSOL. 2007)).

20. New York Arbitration Law § 5 (1920), *reprinted in* A TREATISE ON COMMERCIAL ARBITRATION AND AWARDS, *supra* note 16, at 111 (current version at N.Y. C.P.L.R. § 7503 (CONSOL. 2007)).

21. New York Arbitration Law § 3 (1920), *reprinted in* A TREATISE ON COMMERCIAL ARBITRATION AND AWARDS, *supra* note 16, at 118 (current version at N.Y. C.P.L.R. § 7503

passing its own arbitration statute largely patterned on the New York legislation.[22]

There is a crucial difference, however, between the New York and New Jersey statutes. The relevant controversy limitation of the New Jersey statute is quite a bit narrower than the one found in the New York statute. Congress selected the narrower language from the New Jersey statute for the FAA.[23] As the author discusses in more detail later, this choice by Congress is quite significant.[24]

Congress passed the FAA (originally titled the United States Arbitration Act) in 1925.[25] As with the New York Arbitration Law, a key purpose of the FAA was to reverse judicial hostility towards pre-dispute arbitration provisions[26] and to ensure the enforcement of private arbitration agreements.[27] According to the House Committee Report, "[a]rbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement."[28] The FAA "declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement."[29]

B. *Overview of the FAA's Key Provisions*

The "key . . . provisions" of the FAA are Sections 2 through 4.[30] Section 2 of the FAA ("Section 2"), described by the Supreme

(CONSOL. 2007)).

22. IAN R. MACNEIL, AMERICAN ARBITRATION LAW 42–43 (1992) (describing New Jersey's passage of a bill patterned closely on the New York Arbitration Law).

23. *See* discussion *infra* Part III.A.

24. *See* discussion *infra* Part III.A.

25. United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883, 883–86 (1925) (codified as amended at 9 U.S.C. §§ 1–16 (2006)).

26. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. ___, ___, 131 S. Ct. 1740, 1745 (2011) (citing Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 581 (2008)).

27. *Id.* at ___, 131 S. Ct. at 1748 (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989)). The Court in *Concepcion* indicated that the enforcement of arbitration provisions according to their terms served Congress's goal of promoting arbitration. *Id.* at ___, 131 S. Ct. at 1749.

28. H.R. REP. NO. 68-96, at 1 (1924).

29. *Id.* at 2. Similarly, the Senate Committee Report indicates that the legislation was motivated primarily by a need to undo the rule of revocability and to empower the federal courts to enforce arbitration agreements. *See* S. REP. NO. 68-536, at 2 (1924).

30. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 400 (1967).

Court as the FAA's "centerpiece provision"[31] and "substantive mandate,"[32] undoes in a few sentences the judicial hostility against arbitration. Section 2 also sets forth the scope and coverage of the FAA.[33] Section 2 provides, with respect to pre-dispute arbitration provisions, that:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[34]

The FAA also provides a mechanism for the enforcement of arbitration provisions. Section 3 of the FAA ("Section 3") makes it possible for a party[35] to enforce an arbitration provision by obtaining a stay of litigation when the other party has brought a lawsuit on an issue covered by an arbitration agreement.[36] Section 4 of the FAA ("Section 4") enables a party to petition a court for an order compelling arbitration and requires the court to grant such a motion so long as the "making of the agreement for arbitration" and the "failure to comply" with the agreement are not at issue.[37]

C. *The Three "Non-Lost" Limitations*

In addition to the controversy limitation, the FAA contains three other limitations. These limitations can be characterized as a form limitation, a constitutional limitation, and a state law limitation.

31. Vaden v. Discover Bank, 556 U.S. 49, 64 (2009) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985)) (internal quotation marks omitted).

32. Arthur Andersen LLP v. Carlisle, 556 U.S. 624, ___, 129 S. Ct. 1896, 1901 (2009).

33. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 111 (2001) (describing Section 2 as the FAA's "coverage provision").

34. 9 U.S.C. § 2 (2006).

35. The Court has stated that the "parties" referred to in Section 3 who are empowered to seek a stay of litigation are the parties to the litigation, not the parties to the contract. *Carlisle*, 556 U.S. at ___, 129 S. Ct. at 1901 n.4 (2009).

36. 9 U.S.C. § 3.

37. *Id.* § 4. If either or both of these matters are at issue, the court is to proceed to a summary trial on such issues. *Id.*

1. The Form Limitation

The FAA limits its coverage to "written provision[s]" to arbitrate.[38] There probably is not a great deal to say about this form limitation (although I have tried).[39] Some have described this written form limitation as serving a "Statute of Frauds" purpose of providing evidence of the agreement to arbitrate.[40] It seems more likely that the purpose of this requirement is to register the seriousness of the parties about agreeing to arbitrate.[41]

The term "written provision" is not defined in the FAA.[42] The Court touched on it briefly but only to indicate that a party seeking to enforce an arbitration agreement need not be a signatory of, or even a party to, the "written agreement."[43] Although the Court has not said much about the form limitation, this has not been neglect. Whether an arbitration provision is written or not is simply not often in dispute.

2. The Constitutional Limitation

In addition to a form limitation, the FAA also includes a constitutional limitation. The Supreme Court has held that "it is clear beyond dispute that the [FAA] is based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty.'"[44] The FAA is accordingly limited to written arbitration provisions that are either "in any maritime transaction or a contract evidencing a transaction involving

38. *Id.* § 2; *see also id.* § 3 (referring to an "agreement in writing" for arbitration); *id.* § 4 (referring to a "written agreement for arbitration").

39. *See* Stephen E. Friedman, *Protecting Consumers from Arbitration Provisions in Cyberspace, the Federal Arbitration Act and E-SIGN Notwithstanding*, 57 CATH. U. L. REV. 377, 395–96 (2008) (discussing FAA's requirement of a writing).

40. *See, e.g.*, Kenneth R. Davis, *A Model for Arbitration Law: Autonomy, Cooperation and Curtailment of State Powe*r, 26 FORDHAM URB. L.J. 167, 182 (1999) (characterizing the Section 2 writing limitation as a "Statute of Frauds" Limitation); *see also* Nghiem v. NEC Elec., Inc., 25 F.3d 1437, 1439–40 (9th Cir. 1994) (holding that an employee handbook and an employee letter constituted a "writing memorializing an agreement to arbitrate" and thus satisfied the "written" requirement).

41. I have previously set this argument out at some length. *See* Friedman, *supra* note 39, at 405.

42. *See* 9 U.S.C. §§ 1–2.

43. Arthur Andersen LLP v. Carlisle, 556 U.S. 624, ___, 129 S. Ct. 1896, 1902–03 (2009).

44. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405 (1967) (quoting H.R. REP. NO. 68-96, at 1 (1924)).

commerce."[45] The FAA defines the term "commerce" to mean, among other things, "commerce among the several States" (i.e., "interstate commerce").[46]

The Court addressed the meaning of the term "involving commerce" in *Allied-Bruce Terminix Cos. v. Dobson*, determining that "involving commerce" was broader than "in commerce," which the Court described as a term of art covering "'only persons or activities *within the flow* of interstate commerce.'"[47] A careful assessment of the FAA's "language, background, and structure" (including a consideration of the FAA's legislative history and definitions found in a dictionary contemporaneous with the passage of the FAA) led the Court to conclude that "involving commerce" was "the functional equivalent of 'affecting' [commerce]."[48] This holding expanded the scope of the FAA because "affecting commerce" is the language Congress uses to denote its intent to exercise the full extent of its power under the Commerce Clause.[49]

The contrast between the Supreme Court's close parsing of the "involving commerce" language of the constitutional limitation in Section 2 and the Court's failure to engage in a similar searching inquiry of the meaning of the words in the controversy limitation is striking.[50]

3. The State Law Limitation

The last of the FAA limitations courts typically focus on is the state law limitation. The FAA leaves state law some role in limiting the enforceability of arbitration provisions, which is particularly important in light of the Court's holding in *Southland Corp. v. Keating* that the FAA constitutes a body of substantive law

45. 9 U.S.C. § 2.

46. *Id.* § 1.

47. 513 U.S. 265, 273 (1995) (quoting United States v. Am. Bldg. Maint. Indus., 422 U.S. 271, 276 (1975)).

48. *Id.* at 273–74. The Court referred to the 1933 edition of the OXFORD ENGLISH DICTIONARY. I return to this dictionary in a subsequent section. *See* discussion *infra* Part IV.A.

49. *See Dobson*, 513 U.S. at 273 (citing Russell v. United States, 471 U.S. 858, 859 (1985)). Several years later, the Court reiterated its view that "involving commerce" is broader than "in commerce" and also made clear that the specific transactions at issue need not, in and of themselves, have a "substantial effect on interstate commerce" so long as the general type of activity, in the aggregate, implicates interstate commerce. Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56–57 (2003).

50. *See* discussion *infra* Parts II.C–D.

that is binding on state courts.[51] The savings clause of Section 2 makes arbitration provisions enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."[52] To be enforceable under the FAA, the arbitration provision must pass muster under such state laws.[53]

Courts have addressed the issue as one of preemption, though precisely which state laws are preempted and which are not is a difficult question (and one which this article does not address in any depth). The Court has drawn a line between state laws that "'arose to govern issues concerning the validity, revocability, and enforceability of contracts generally,'" on the one hand (these types of state laws are permissible under the FAA), and those that take their "'meaning precisely from the fact that a contract to arbitrate is at issue'" (these types of laws are preempted by the FAA).[54] Accordingly, arbitration provisions are subject to general contract doctrines, such as unconscionability, fraud, and duress.[55] However, laws that "singl[e] out arbitration provisions for suspect status," such as a requirement that arbitration provisions be particularly prominent, are preempted.[56]

The Court recently attempted to clarify the murky line between acceptable state laws and ones the FAA has preempted. In *AT&T Mobility LLC v. Concepcion*, the Court addressed an application of the California unconscionability doctrine that deemed class action waivers in consumer adhesion contracts unenforceable in some circumstances.[57] The Court held that this rule was preempted by the FAA.[58] The Court noted that a state law might appear arbitration-neutral on its face but may still be applied in a way that disfavors arbitration.[59] Such a situation poses a "complex"

51. 465 U.S. 1, 15–16 (1984).

52. 9 U.S.C. § 2 (2006).

53. *See id*.

54. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 685 (1996) (quoting Perry v. Thomas, 482 U.S. 483, 483 n.9 (1987)).

55. *See* Rent-A-Center, W., Inc. v. Jackson, 561 U.S. ___, ___, 130 S. Ct. 2772, 2776 (2010) (quoting *Casarotto*, 517 U.S. at 687) (indicating that arbitration provisions can be invalidated under the doctrines of fraud, duress, and unconscionability).

56. *Casarotto*, 517 U.S. at 687.

57. 563 U.S. ___, ___, 131 S. Ct. 1740, 1744–46 (2011) (citing Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005)) (summarizing California's *Discover Bank* rule that deems "most collective-arbitration waivers in consumer contracts . . . unconscionable").

58. *Id*. at ___, 131 S. Ct. at 1753.

59. *See id*. at ___, 131 S. Ct. at 1747 (citing *Perry*, 482 U.S. at 492 n.2).

problem.[60] The Court concluded that the savings clause was not intended to preserve state law rules "that stand as an obstacle to the accomplishment of the FAA's objectives," including the objective of promoting arbitration.[61] According to the Court, the California law at issue did stand as an obstacle to the promotion of arbitration and, hence, was preempted.[62] Although *Concepcion* left things less than clear, it appears the state law limitation means that arbitration provisions must pass muster under those state laws that neither single out arbitration for unfavorable treatment on their face nor stand as an obstacle to the promotion of arbitration.[63] It is likely that a great deal of litigation in coming years will address what it means to stand as an obstacle to the promotion of arbitration.

The Court may or may not be correct in its jurisprudence on the state law limitation, but it has certainly not ignored it.

D. *The Controversy Limitation and the Arbitration Agreements that Exceed It*

Having addressed the form limitation, the constitutional limitation, and the state law limitation, we can now turn to the much ignored controversy limitation of Section 2.

Section 2 limits the FAA's coverage to provisions "to settle by arbitration a controversy . . . arising out of such contract [(i.e., a contract evidencing a transaction in interstate commerce)] or transaction [(i.e., a maritime agreement)], or the refusal to perform the whole or any part thereof."[64] That language is simple, and one might expect parties to draft arbitration provisions that track it in order to ensure enforcement under the statute. But they do not. They go well beyond it.

60. *Id.*

61. *Id.* at ___, 131 S. Ct. at 1748 (citing Crosby v. Nat'l Foreign Trade Council, 540 U.S. 363, 372–73 (2000); Geir v. Am. Honda Motor Co., 529 U.S. 861, 872 (2000)).

62. *Id.* at ___, 131 S. Ct. at 1750–52 (citations omitted).

63. Locating the line between permissible and preempted state law is a difficult task, even after *Concepcion*. Professor Hiro Aragaki has argued that we should look to the jurisprudence in anti-discrimination law for guidance in drawing this line. Hiro N. Aragaki, *Arbitration's Suspect Status*, 159 U. PA. L. REV. 1233, 1237–39 (2011).

64. 9 U.S.C. § 2 (2006). Section 2 also covers agreements to arbitrate existing disputes, an issue that this article does not address. *Id.*

The major providers of arbitration services have encouraged the use of language exceeding the scope of Section 2. The American Arbitration Association[65] (the "AAA") counsels parties drafting arbitration agreements to include not only disputes arising out of, but also those merely "relating to," the contract,[66] even though such language is not found in Section 2. The AAA recommended clause is as follows: "Any controversy or claim arising out of *or relating to* this contract, or the breach thereof, shall be settled by arbitration administered by the [AAA]."[67] Parties often adopt this language.[68] JAMS, another major provider of arbitration services,[69] also recommends language exceeding the scope of the FAA, suggesting a "standard arbitration clause" for commercial contracts that subjects to arbitration "[a]ny dispute, claim, or controversy arising out of *or relating to* [the] Agreement or the breach, termination, enforcement, interpretation or validity thereof."[70]

The language suggested by the AAA and JAMS reaches outward to include controversies well beyond the contractual core of the FAA. Additionally, both organizations seek to facilitate and encourage an extensive inward reach for arbitration provisions. That is, both organizations seek to ensure that disputes about the arbitration provision itself, as opposed to disputes about the underlying contract, are subject to arbitration. The language suggested by JAMS subjects to arbitration many disputes about the arbitration provision itself, "including the determination of the

65. The AAA describes itself as the "largest [Alternative Dispute Resolution] provider worldwide." *Dispute Resolution Services*, AM. ARBITRATION ASS'N, http://www.adr.org/ (open "Services" menu; then follow "Dispute Resolution Services" hyperlink) (last visited May 1, 2012).

66. AM. ARBITRATION ASS'N, DRAFTING DISPUTE RESOLUTION CLAUSES: A PRACTICAL GUIDE 7 (2007) [hereinafter DRAFTING DISPUTE RESOLUTION CLAUSES].

67. *Id*. (emphasis added).

68. *See, e.g.*, Lowrey v. Tritan Grp., Ltd., No. 3:08-cv-00779, 2009 WL 2136159, at *1 (M.D. Tenn. July 14, 2009) (involving an arbitration agreement that uses the AAA suggested language); Brown v. Gen. Steel Domestic Sales, LLC, No. CV 08-00779 MMM (SHx), 2008 WL 2128057, at *2 (C.D. Cal. May 19, 2008) (same); Goldleaf Fin. Solutions, Inc. v. Merchs. & Planters Bank, No. 3:07-0998, 2008 WL220263, at *1 (M.D. Tenn. Jan. 25, 2008) (same).

69. JAMS describes itself as "the largest private alternative dispute resolution . . . provider in the world." *About JAMS*, JAMS: ARBITRATION, MEDIATION, AND ADR SERVICES, http://www.jamsadr.com/aboutus_overview/ (last visited May 1, 2012).

70. JAMS, JAMS CLAUSE WORKBOOK: A GUIDE TO DRAFTING DISPUTE RESOLUTION CLAUSES FOR COMMERCIAL CONTRACTS 2 (2011) (emphasis added).

scope or applicability" of the arbitration provision.[71] In addition, Rule 7 of the AAA's Commercial Arbitration Rules, which is frequently adopted by parties in their arbitration agreements,[72] provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement."[73]

These providers of arbitration services suggest this language in order to expand the scope of arbitration agreements. The AAA advises that its suggested language "makes clear that all disputes are arbitrable."[74] JAMS's suggested language is designed to "provide a simple means of assuring that any future dispute[s] will be arbitrated."[75]

It is perfectly understandable that the AAA and JAMS would urge parties to include the broadest range of controversies within their arbitration agreements, but the FAA does not include the arbitration of "all" or "any" disputes in its scope. It includes only a much narrower universe of controversies.

Another popular (and broad) variant adopts the "relating to" language and explicitly incorporates an almost limitless range of disputes. Some recent examples of this variant are as follows:

> All disputes, claims, or controversies arising from or relating to this Agreement or the relationships which result from this Agreement, or the validity of this arbitration clause or the entire Agreement, shall be resolved by binding arbitration . . . . The parties agree and understand that all disputes arising under case law, statutory law, and all other laws including, but not limited to, all contract, tort, and property disputes, will be subject to binding arbitration in accord with this agreement.[76]

> All disputes, claims, or controversies between Dealer and [a supplier of fuel] and/or any of [supplier's] employees, arising from or relating to *this* Contract, the making of this Contract or the validity of this arbitration clause, shall be resolved by binding arbitration . . . . The

71. *Id.*

72. *See, e.g.*, Fallo v. High-Tech Inst., 559 F.3d 874, 877 (8th Cir. 2009) (involving an arbitration provision that incorporates the rule); Barkl v. Career Educ. Corp., No. 10-3565 ADM/JJG, 2010 WL 4979231, at *2–3 (D. Minn. Dec. 2, 2010) (same).

73. AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R. 7(a) (2009).

74. DRAFTING DISPUTE RESOLUTION CLAUSES, *supra* note 66, at 8.

75. JAMS, *supra* note 70, at 2.

76. Olivieri v. Green Tree Servicing, LLC, No. 4:08-cv-3234-TLW-TER, 2010 WL 972811, at *1 (D.S.C. Feb. 12, 2010) (internal quotation marks omitted).

> parties agree and understand that all disputes arising under case law, statutory law, and all other laws including, but not limited to, all contract, tort, fraud and property disputes, will be subject to binding arbitration in accord with this Contract.[77]
>
> All disputes, claims or controversies arising from or relating to this Contract or the relationships which result from this Contract, or the validity of this arbitration clause or the entire Contract, shall, at the election of either party, be resolved by binding arbitration . . . . The parties agree and understand that all disputes arising under case law, statutory law, and all other laws including, but not limited to, all contract, tort, and property disputes, will be subject to binding arbitration in accordance with this Contract.[78]

All of these provisions were enforced under the FAA without any discussion of the fact that they exceed the FAA.[79] The next Part describes how we got to this point.

II. HOW THE LIMITATION WAS LOST: THE COURT EXPANDS THE FAA BOTH OUTWARD AND INWARD

This Part of the article begins by discussing some relatively early resistance from the Supreme Court to the nearly all-encompassing controversy scope that currently prevails. As described below, this resistance was not based on the language of the FAA—indeed, such language was virtually ignored by the Court. Instead, this resistance was based on concerns about the capability of arbitrators to decide the specific statutory claims at issue. But once those concerns were allayed, there was really no stopping the expansion of the FAA. Without the language of the statute to guide or restrain it, the Court has expanded the scope of the FAA rather dramatically, both outward and inward.

A. *Initial Resistance*

On a few notable occasions the Court has shown some resistance to a virtually all-encompassing controversy scope for the

77. Lafayette Texaco, Inc. v. Smith, No. 3:08cv406-MHT, 2010 WL 653494, at *3 (M.D. Ala. Feb. 19, 2010) (internal quotation marks omitted).

78. Agnew v. Honda Motor Co., No. 1:08-cv-01433-DFH-TAB, 2009 WL 1813783, at *1 (S.D. Ind. May 20, 2009) (internal quotation marks omitted).

79. *See Lafayette Texaco*, 2010 WL 653494, at *4 (enforcing arbitration provision without discussing difference between language of the FAA and language of the arbitration provision); *Olivieri*, 2010 WL 972811, at *4 (same); *Agnew*, 2009 WL 1813783, at *5 (same).

FAA. Two leading cases in this regard are *Wilko v. Swan*[80] and *Alexander v. Gardner-Denver Co.*,[81] each of which expressed skepticism about the arbitrability of federal statutory claims under the FAA. Critically, neither of these cases involved any discussion of the actual language of the controversy limitation. Instead, they based their resistance on skepticism about the competence of arbitrators.

In *Wilko*, a 1953 opinion, the Court held that an agreement to arbitrate a claim under the Securities and Exchange Act of 1933 (the "SEA of 1933") was not enforceable under the FAA.[82] The Court noted that the SEA of 1933 had been passed to "protect investors" by requiring various types of full and fair disclosure about securities.[83] The Court also recognized that the FAA established "by statute the desirability of arbitration as an alternative to the complications of litigation."[84] The "hospitable attitude . . . toward arbitration," however, was not sufficient to lead to a conclusion that the claims under the SEA of 1933 were arbitrable.[85] Instead, the Court expressed concerns that the case required "subjective findings on the purpose and knowledge of an alleged violator of the Act. They must be not only determined but applied by the arbitrators without judicial instruction on the law."[86] The Court continued, noting that "[a]s their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of [various statutory requirements] cannot be examined."[87] The Court held that the "protective provisions of the [SEA of 1933] require the exercise of judicial discretion to fairly assure their effectiveness" and that arbitration of claims arising under this Act would not be appropriate.[88]

The *Wilko* Court thus based its holding entirely on its assessment of the desirability of the arbitration of claims under the

80. 346 U.S. 427 (1953).

81. 415 U.S. 36 (1974).

82. 346 U.S. at 438.

83. *Id.* at 431 (citing Securities Act of 1933, Pub. L. No. 22, 48 Stat. 74, 74, 77; A.C. Frost & Co. v. Coeur D'Alene Mines Corp., 312 U.S. 38, 40 (1941); Okla.-Tex. Trust v. Sec. & Exch. Comm'n, 100 F.2d 888, 891 (10th Cir. 1939); S. Rep. No. 73-47, at 1 (1933)).

84. *Id.*

85. *Id.* at 432.

86. *Id.* at 435–36.

87. *Id.* at 436 (citations omitted).

88. *Id.* at 437 (citations omitted).

SEA of 1933.[89] The language of Section 2 played no role in its decision—indeed, the Court neither quoted nor cited Section 2 and even indicated that while arbitration of claims under the SEA of 1933 was not desirable, arbitration of other statutory claims under the FAA might not present a problem.[90]

The Court's 1974 decision in *Alexander v. Gardner-Denver Co.* may be its most extensive articulation of mistrust of the arbitral process when it comes to noncontractual claims, although the relevant language in the case was largely dicta.[91] Again, there was no discussion of the key language of the FAA. Instead, the Court discussed the comparative benefits of litigation as opposed to arbitration in the context of violations of Title VII of the Civil Rights Act of 1964.[92] The Court noted that "[a]rbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII."[93] The Court rested its conclusion "on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation."[94] The Court further noted that the arbitrators' specialized competence "pertains primarily to the law of the shop, not the law of the land. Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations."[95] In contrast, "the resolution of statutory or constitutional issues is a primary responsibility of [the] courts."[96] The Court in *Gardner-Denver*, at least in the above-referenced dicta, articulated a view that arbitration was at its most appropriate when it comes to the resolution of contractual claims.[97] But the Court did not ground its analysis in the controversy language of Section 2 (just as it had not in *Wilko*).[98] This failure laid the foundation for a dramatic ex-

89. *See id.* at 431.

90. *See id.* at 431–32 (citations omitted) (indicating hope for the usefulness of the FAA in controversies based on statutes).

91. *See* Makins v. District of Columbia, 277 F.3d 544, 547 (D.C. Cir. 2002).

92. Alexander v. Gardner-Denver Co., 415 U.S. 36, 56 (1974).

93. *Id.*

94. *Id.* at 56–57.

95. *Id.* at 57 (footnote omitted) (citing United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581–83 (1960)).

96. *Id.*

97. *Id.* at 56.

98. *Compare id.* at 58–60, *with* Wilko v. Swan, 346 U.S. 427, 431–32 (1953).

pansion of the AAA scope when the Supreme Court's view of arbitration changed.

B. *From Skeptic to Cheerleader*

The skepticism towards arbitration expressed by the Court in *Wilko* and *Gardner-Denver* has been replaced by something very different as the Court has become a true believer in the effectiveness and appropriateness of arbitration in virtually all contexts. Soon after *Gardner-Denver*, a "radical change . . . in the Court's receptivity to arbitration" occurred.[99] In various opinions, the Court criticized its own earlier skepticism towards arbitration and expressed a much more positive view of the desirability of arbitration. For example, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*,[100] which overruled *Wilko*,[101] the Court criticized *Wilko* for its hostility and suspicion towards arbitration and stated that the earlier case had "fallen far out of step with our current strong endorsement of" arbitration as a means for resolving statutory claims.[102] Similarly, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court noted that we were "well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."[103] Accordingly, the Court held that antitrust claims were subject to arbitration under the FAA.[104]

Similarly, in *Shearson/American Express, Inc. v. McMahon*, the Court criticized the outdated "mistrust of the arbitral process" harbored by the Court in *Wilko*.[105] The Court noted that "arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims."[106] In *14 Penn Plaza LLC v. Pyett*, the Court held that arbitrators were fully capable of handling

99. *See* Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 77 (1998) (noting a shift in the Court's attitude towards arbitration from negative to favorable from the 1970s to the 1990s).

100. 490 U.S. 477 (1989).

101. *Id.* at 485.

102. *Id.* at 481.

103. 473 U.S. 614, 626–27 (1985).

104. *Id.* at 625, 640.

105. 482 U.S. 220, 231–32 (1987) (citing Wilko v. Swan, 346 U.S. 427 (1953)).

106. *Id.* at 232.

claims under the Age Discrimination in Employment Act,[107] and it criticized *Gardner-Denver* as having been permeated by an outdated mistrust and suspicion towards arbitration that the Court had since rejected.[108]

Because the original resistance to an expansive scope of the FAA had been grounded in suspicion about arbitration (instead of being grounded in the language of the FAA), once that skepticism ended there was nothing to prevent a limitless expansion of the FAA except for the language of the FAA. The Court has, however, largely disregarded that language.

C. *Expanding the FAA Outward by Ignoring Its Language*

The Court has routinely enforced arbitration provisions without pausing to consider whether the scope of these provisions exceeds the language of the FAA.[109] In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, for example, the arbitration provision at issue stated: "Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration."[110] The Supreme Court described this as "a broad arbitration clause."[111] But it is more than broad; it is actually broader than the language of Section 2, which does not include the "relating to" language.[112] The Court did not comment at all on that discrepancy.[113]

107. 556 U.S. 247, 269 (2009).

108. *Id.* at 265–70.

109. In a fascinating article, Professor David Horton argues that the Court's reading of the FAA over the years has given rise to "an impermissible private delegation" in which private parties are essentially given the power to craft law. David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 480 (2011). That is, companies have been given almost complete authority to craft whatever procedural rules they wish for the resolution of disputes. *Id*. at 480. The problem is compounded by the fact that such procedures are typically imposed unilaterally. *See id.* In a sense, the phenomenon of disregarding the language of the controversy limitation is another such instance of delegation. The Supreme Court has read (or, more accurately, ignored) the FAA in such a way as to permit private parties to draft their own controversy limitation language without regard to the statute itself.

110. 388 U.S. 395, 398 (1967) (internal quotation marks omitted).

111. *Id.*

112. *See* 9 U.S.C. § 2 (2006).

113. *See Prima Paint*, 388 U.S. at 397–98; *see also* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 4–5 (1983) (describing an arbitration provision covering all disputes "arising out of, or relating to" a contract or its breach as "broad" without noting that the "relating to" language is nowhere found in the statute) (internal quotation marks omitted).

Ignoring the statutory language has had a significant impact. Consider, for example, the crucial case of *Southland Corp. v. Keating*.[114] Although *Keating* was not the first Supreme Court opinion to sanction the arbitration of noncontractual claims,[115] the opinion expanded the scope of the FAA in a significant way. *Keating* made clear that the FAA included agreements to arbitrate controversies arising out of state statutes.[116] The arbitration provision in *Keating* was of the "broad" variety and, in relevant respects, was identical to the one found in *Prima Paint*.[117] It provided for arbitration of "[a]ny controversy or claim arising out of *or relating to* this Agreement or the breach hereof."[118] The claim at issue arose under the California Franchise Investment Law.[119] In a stark example of simply ignoring the controversy limitation out of existence, the Court, in assessing whether the statutory claims were within the FAA, stated "[w]e discern only two limitations on the enforceability of arbitration provisions governed by the [FAA]."[120]

Only two? Which two made the cut? According to the Court, the arbitration provision "must be part of a written maritime contract or a contract 'evidencing a transaction involving commerce' and such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.'"[121] This description actually accounts for three of the four limitations found in the FAA: the form limitation, the state law limitation, and the constitutional limitation. But it completely ignores the controversy limitation.

114. 465 U.S. 1 (1984).

115. For instance, shortly after rendering its *Gardner-Denver* decision, the Court decided *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), in which it permitted arbitration of claims that had been brought under the Securities and Exchange Act of 1934. *Id.* at 509, 519–20. The Court distinguished *Wilko* largely based on the international nature of the transaction in *Scherk*, which complicated the question of which country's law should apply to disputes arising out of the contract. *Id.* at 515–16. The Court also noted that in transactions of an international nature a "contractual provision specifying in advance the forum in which disputes shall be litigated . . . is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Id.* at 516.

116. *Keating*, 465 U.S. at 10–11.

117. *Id.* at 15 n.7 (citing *Prima Paint*, 388 U.S. at 403–04, 406).

118. *Id.* at 4 (emphasis added) (internal quotation marks omitted).

119. *Id.*

120. *Id.* at 10–11.

121. *Id.* at 11 (footnote omitted).

What is even stranger is that the issue was squarely before the Court. One of the parties contended that the arbitration clause did not cover a claim arising under the California statute.[122] The Court addressed the matter by noting that the "arbitration clause . . . provides for the arbitration of 'any controversy or claim arising out of or relating to this Agreement or the breach hereof'" and held that this language was "broad enough to cover" claims under the California statute.[123] But the Court did not pause to consider whether the language of Section 2 was broad enough to cover those same state statutory claims. Instead, it looked solely to the language of the agreement between the parties.[124]

The Court continued to give the controversy limitation language the silent treatment as it expanded the scope of the FAA. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* involved an agreement to arbitrate "[a]ll disputes, controversies or differences which may arise between [the parties] out of or in relation to" five of the fifteen articles of the parties' agreement for the distribution of vehicles.[125] At issue in *Mitsubishi Motors* was the question of the arbitrability under the FAA of claims arising under the Sherman Act.[126]

As noted above, the Court addressed the matter largely as a policy concern about the competence of arbitrators to decide such cases and held that the claims were arbitrable.[127] This focus on policy concerns apparently left no room for consideration of the statute. The lower court's determination that the language of the arbitration clause encompassed the statutory antitrust claims was not squarely before the Court.[128] However, the Court did address the suggestion that the arbitration provision's reference to claims arising out of or in relation to only certain specified provisions in the agreement meant that the arbitration provision should be read narrowly to exclude claims arising under a statute.[129] The Court quoted the language of the arbitration provision,

122. *Id.* at 15 n.7.

123. *Id.*

124. *See id.*

125. 473 U.S. 614, 617 (1985) (citation omitted) (internal quotation marks omitted).

126. *Id.* at 619–20; *see also* 15 U.S.C. §§ 1–7 (1982 & Supp. II 1985).

127. *Mitsubishi Motors*, 473 U.S. at 626–27, 640; *see supra* text accompanying notes 103–04.

128. *Mitsubishi Motors*, 473 U.S. at 624 & n.13.

129. *Id.* at 624 n.13.

including the reference to disputes "in relation" to specified parts of the agreement.[130] The Court observed that, but for the limitation to specific parts of the underlying agreement, the arbitration provision was "otherwise broad" and included the statutory claim as well.[131] Indeed, the Court interpreted the broad arbitration language to mean that all that was necessary was that the statutory claims "touch matters" covered by the relevant parts of the agreement.[132] This sounds much more like a claim that "relates to" a portion of the agreement than a claim that "arises out of" it.[133]

The Court then turned from the language of the private agreement to the language of the FAA to address the argument that an express agreement to arbitrate statutory claims is required.[134] But after carefully parsing the language of the private agreement, the Court did not even mention the controversy limitation language of Section 2.[135] The Court simply wrote that language out of existence by describing Section 2 as follows (and please note that the ellipsis in the quotation is not mine—it was added by the Court): "The Act's centerpiece provision makes a written agreement to arbitrate 'in any maritime transaction or a contract evidencing a transaction involving commerce . . . valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'"[136]

What language has the Court excised? The answer will hardly be surprising: the Court eliminated the controversy language (and this in a case that focused squarely on whether the FAA should apply to a particular type of controversy). Instead, the Court rejected, as a matter of policy, any presumption against the arbitration of statutory claims and held that arbitration was a perfectly suitable forum for the resolution of statutory claims.[137]

The Court acknowledged the possibility that "not . . . all controversies implicating statutory rights are suitable for arbitra-

130. *Id*.

131. *Id.*

132. *Id.*

133. *See* discussion *infra* Part IV.A (describing differences between a claim "arising out" of a contract and a claim that "relates to" such a contract).

134. *Mitsubishi Motors*, 473 U.S. at 624–25.

135. *Id*. at 625–26.

136. *Id.* at 625 (alteration in original) (quoting 9 U.S.C. § 2 (1985)).

137. *Id.* at 625, 628.

tion"[138] but indicated that "it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable."[139] There is more than a little irony here. The Court in *Mitsubishi Motors* focused closely on the language of the statute out of which the claims arose (i.e., the Sherman Act) to divine congressional intent.[140] However, the Court has largely ignored language of the FAA that explicitly restricts the FAA's scope to only a narrow category of controversies.[141]

The dissenting opinion in *Mitsubishi Motors*, written by Justice Stevens, did address to some degree both the language of the contract and the language of the statute. The dissent first focused on the language of the arbitration agreement and concluded that "[a]s a matter of ordinary contract interpretation" the antitrust claims were not within the scope of the agreement.[142] According to the dissent, the arbitration clause only applied to two-party disputes and not the type of three-party dispute at issue in *Mitsubishi Motors*.[143] Additionally, and more relevant for purposes of this article, the dissent observed that the arbitration provision "only applie[d] to disputes 'which may arise between [the parties] out of or in relation to [five articles of the fifteen article agreement] or for the breach thereof.'"[144] The dissent concluded that the antitrust claim did not, in fact, "arise out of" those five articles that dealt with very specific issues under the contract.[145] This led to a discussion by the dissent of whether the antitrust claim was a dispute "in relation to" those five articles.[146] The dissent stated that the "in relation to" language meant that the claim must be predicated on contractual rights defined in the five articles and

138. *Id.* at 627.

139. *Id.*

140. *Id.* at 635–36 (citing Sherman Act, ch. 647, 26 Stat. 209, 210 sec. 7 (1890); Clayton Act, Pub. L. No. 63–212, 38 Stat. 730, 731 sec. 4 (1914) (codified as amended at 15 U.S.C. § 15 (1982)) (other citations omitted). The Court similarly did so with respect to the Credit Repair Organization Act in *CompuCredit Corp. v. Greenwood*, 565 U.S. ___, ___, 132 S. Ct. 665, 672–73 (2012) (citations omitted).

141. *See, e.g.*, *Mitsubishi Motors*, 473 U.S. at 627.

142. *Id.* at 643 (Stevens, J., dissenting).

143. *Id.* at 643–44.

144. *Id.* at 644.

145. *Id.*

146. *Id.*

that the antitrust claim was not.[147] The dissent based its reasoning largely on a view that arbitration was not a desirable or effective forum for the resolution of statutory claims,[148] citing *Wilko* and *Gardner-Denver* in support of that proposition.[149]

In my view, the dissent missed both the point and an opportunity. The dissent recognized that there is a difference between the "arising out of" and "in relation to" language but did not discuss the fact that the "in relation to" language is not in the FAA.[150] The dissent's analysis should have ended after the conclusion that the claims did not arise out of the contract or its breach. At any rate, because the dissent gave a narrow meaning to the term "in relation to" (indicating that it meant the claims must be "predicated on contractual rights")[151] and construed the language of the statute narrowly, there was presumably no reason to discuss any discrepancy between them.[152]

The Court's expansion of the scope of the FAA has continued, facilitated by a continuing disregard for the language of the statute. In *Rodriguez de Quijas v. Shearson/American Express, Inc.*, the Court addressed an arbitration provision in which the parties agreed to arbitrate any controversies "relating to" the accounts established through a standard customer agreement.[153] The Court expressly overruled *Wilko* and held that claims arising under the SEA of 1933 are subject to arbitration.[154] However, the Court did not so much as mention that the "relating to" language in the agreement differed from the FAA's own scope provision.

147. *Id.*

148. *Id.* at 647–48.

149. *Id.* at 648–51 (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 57–58 (1974); Wilko v. Swan, 346 U.S. 427, 437–38 (1953)).

150. *Id.* at 644–46.

151. *Id.* at 644.

152. A portion of Justice Stevens's dissent, in which only Justice Brennan joined, did involve a discussion of Section 2's language, including the controversy limitation. *Id.* at 645–46. Justices Stevens and Brennan concluded that the "plain language of [Section 2] encompasses Soler's claims that arise out of its contract with Mitsubishi, but does not encompass a claim arising under federal law, or indeed one that arises under its distributor agreement." *Id.* at 646. But even in this portion of the opinion there was no discussion of the discrepancy between the language of the statute and the language of the arbitration agreement. *See id.* at 645–50. This is probably because for the dissent the "relating to" language was no broader than the "arising out of" language. *See id.* at 645–46.

153. 490 U.S. 472, 478 (1989).

154. *Id.* at 485.

In *Green Tree Financial Corp.-Alabama v. Randolph*, the Court made clear that the FAA applied to disputes arising under the Truth in Lending Act.[155] The arbitration provision in *Randolph* (which the Court never compared to the language of the FAA) was explicit in its breadth, stating in relevant part as follows:

> All disputes, claims, or controversies arising from or relating to this Contract or the relationships which result from this Contract, or the validity of this arbitration clause or the entire contract, shall be resolved by binding arbitration . . . . The parties agree and understand that all disputes arising under case law, statutory law, and all other laws, including, but not limited to, all contract, tort, and property disputes, will be subject to binding arbitration in accord with this Contract.[156]

The Court said nothing about the fact that this provision far exceeds the language of the FAA.

Occasionally, the Court will find language in an arbitration provision insufficiently broad to cover a dispute. For instance, in *Granite Rock Co. v. International Brotherhood of Teamsters*, the Court indicated that an arbitration provision covering claims "arising under" a collective bargaining agreement was "relatively narrow" and did not encompass a dispute as to whether the collective bargaining agreement was ratified because such a dispute "concern[ed] the [collective bargaining agreement's] very existence."[157] Of course, "arising under" is not the same as "arising out of," though it is a great deal closer to "arising out of" than it is to "relating to." Indeed, the drafters of the New Jersey statute on which Section 2's controversy limitation is modeled apparently viewed "arising thereunder" as essentially synonymous with "arising out of."[158]

It is, at the very least, interesting that eliminating the "arising out of and relating to" language and replacing it with "arising under" is the difference between a "broad" arbitration provision and a "relatively narrow" one. Surely it is worth noting that Section 2 is much closer to what the Court itself has described as "relatively narrow" language than it is to language the Court has described as broad.

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155. 531 U.S. 79, 90 (2000).

156. *Id.* at 83.

157. 561 U.S. ___, ___, 130 S. Ct. 2847, 2862 (2010) (citing Drake Batteries, Inc. v. Local 50 Am. Bakery & Confectionary Workers Int'l, 370 U.S. 254, 256–57 (1962)).

158. *See infra* text accompanying notes 179–81.

D. *Expanding the FAA Inward by Ignoring Its Language*

The previous section describes what we can think of as an "outward" expansion of the FAA. This outward expansion has been characterized by judicial acceptance of language in private agreements to expand the FAA outward to include agreements to arbitrate disputes well beyond the FAA's contractual core. But there has more recently been an inward expansion, as well. The Court has used the extra-statutory language of arbitration provisions to bring within the FAA disputes over the validity, scope, and formation of an arbitration provision. The Court has essentially ignored the language of the FAA to reach this result.

In *Green Tree Financial Corp. v. Bazzle*, the Court addressed an arbitration provision that subjected to arbitration "[a]ll disputes, claims, or controversies arising from or relating to this contract."[159] In a plurality opinion, the Court noted that a dispute about what an arbitration contract in each case means is a dispute "relating to the contract."[160] The Court thus implicitly recognized that "relating to" has its own reach and that "relating to" differs from "arising from" (which, admittedly, differs slightly from "arising out of"). However, the plurality opinion did not acknowledge that the "relating to" language, although part of the parties' agreement, was not in Section 2.

When a similar issue came before the Court recently in *Rent-A-Center, West, Inc. v. Jackson*, the Court again addressed the matter by ignoring the conflict between the "relating to" language and the language of the FAA.[161] *Jackson* involved two arbitration provisions. One, which was not before the Court, covered "disputes arising out of" an employee's employment with the other party.[162] The provision that was directly before the Court gave the arbitrator "exclusive authority to resolve any dispute, relating to the . . . enforceability . . . of this [arbitration] Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable."[163] Thus, the relevant scope provision included only the "relating to" language and not the "arising

159. 539 U.S. 444, 448 (2003).
160. *Id.* at 451.
161. 561 U.S. ___, 130 S. Ct. 2772 (2010).
162. *Id.* at ___, 130 S. Ct. at 2777.
163. *Id.* (internal quotation marks omitted).

out of" language. The "controversy" at issue was the unconscionability of the arbitration agreement.[164]

The Court dealt with the mismatch between the language of the FAA and the language of the provision at issue by editing. Referring to the language of Section 2, the Court noted that the agreement contained "multiple 'written provision[s]' to 'settle by arbitration a controversy.'"[165] But the Court stopped there without going on to the actual controversy limitation language that limits arbitrable controversies to those that arise out of the contract.[166] Instead, the Court made clear that the agreement to arbitrate the validity of the arbitration agreement was indeed within the scope of the FAA and was a stand-alone agreement that could be enforced like any other arbitration agreement under the FAA.[167] But, as discussed later, the contract from which the dispute must arise is not the arbitration provision, but the contract containing it.[168]

III. THE CONTROVERSY LIMITATION'S LIMITED SCOPE

Ignoring the controversy limitation will not make it go away. The scope of the FAA is limited to agreements to arbitrate controversies that originate in the performance or breach of the contract containing the arbitration provision.[169] Congress's choice in this regard was deliberate and should be respected.[170]

164. *Id*.

165. *Id*. (alteration in original) (quoting 9 U.S.C. § 2 (2006)).

166. The Court did set out the text of Section 2 in its entirety earlier in the opinion. *Id*. at ___, 130 S. Ct. 2776 (quoting 9 U.S.C. § 2).

167. *Id*. at ___, 130 S. Ct. at 2777–78.

168. *See* discussion *infra* Part III.C.

169. I am not arguing that Congress limited the FAA to questions of fact as opposed to questions of law. In a law review article co-authored with Kenneth Dayton, Julius Henry Cohen, one of the primary drafters of the FAA, indicated that questions of law, so long as they relate to contractual disputes, were properly the subject of arbitration. *See infra* notes 193–94 and accompanying text. Nor am I arguing that Congress intended that only disputes between sophisticated parties or merchants were intended to be subject to enforcement under the FAA. Many fine articles have argued this point. *See, e.g.*, Horton, *supra* note 109, at 455; Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1636 (2005). However, in my view Congress did not intend to restrict the application of the FAA in this manner. *See* Stephen E. Friedman, *Arbitration Provisions: Little Darlings and Little Monsters*, 79 FORDHAM L. REV. 2035, 2050–55 (2011) (arguing that Congress was aware that the FAA would apply to contracts with consumers).

170. There may be a handful of statutes that should be subject to arbitration under the FAA. For instance, Article 2 of the Uniform Commercial Code is a statute, but it is plainly

A. *A Deliberate and Unusual Deviation*

Congress could easily have written a statute that covered agreements to settle any controversy "arising between the parties to the contract." This is, in fact, the language used in the New York Arbitration Law.[171] The language of the New York Arbitration Law is broad enough to encompass virtually any type of dispute.

As the Supreme Court has observed, for the most part the "text of the FAA was based upon that of New York's arbitration statute."[172] But Congress deviated from the New York Arbitration Law when it came to the controversy limitation and instead followed the language of the 1923 New Jersey Arbitration Law.[173] The New Jersey Arbitration Law differs in a crucial way from the New York Arbitration Law. The New Jersey version provides two separate statements of scope—a broad scope for agreements to arbitrate existing disputes (towards which courts did not historically express any hostility) and a narrower one for pre-dispute arbitration agreements.[174] With respect to the arbitration of existing disputes, the New Jersey Arbitration Law was quite broad and applied to agreements to arbitrate an existing controversy "which arises out of a contract or the refusal to perform the whole or any part thereof *or the violation of any other obligation*."[175] Such a broad clause would, of course, cover not only a dispute arising out of the contract (or its breach), but also a dispute arising from the violation of any other common law or statutory obligation. In contrast, with respect to pre-dispute arbitration agreements, the New Jersey law included a much narrower range of agreements, covering only agreements to arbitrate "a contro-

contract law, dealing as it does with matters of contract formation, construction, performance, breach, and remedies. *See generally* U.C.C. §§ 2-201 to -210 (2011) (Part 2, dealing with "Form, Formation and Readjustment of Contract"); *id.* §§ 2-301 to -328 (Part 3, dealing with "General Obligation and Construction of Contract"); *id.* §§ 2-501 to -515 (Part 5, dealing with "Performance"); *id.* §§ 2-601 to -616 (Part 6, dealing with "Breach, Repudiation and Excuse"); *id.* §§ 2-701 to -725 (Part 7, dealing with "Remedies").

171. New York Arbitration Law § 2 (1920), *reprinted in* A TREATISE ON COMMERCIAL ARBITRATION AND AWARDS, *supra* note 16, at 92 (current version at N.Y. C.P.L.R. § 7501 (CONSOL. 2007)).

172. Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 589 n.7 (2008).

173. *Compare* United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 sec. 2 (1925), *with* Act of Mar. 21, 1923, ch. 134, 1923 N.J. Laws 291 § 1.

174. Act of Mar. 21, 1923, §§ 1–2.

175. *Id.* § 2 (emphasis added).

versy thereafter arising out of the contract or the refusal to perform the whole or any part thereof."[176]

This narrower language is almost the exact language adopted in Section 2 of the FAA.[177] This language stands in sharp contrast to the broad language of the New York Arbitration Law, which provides for the arbitrability of all disputes that may arise between the parties.[178]

The statement accompanying the bill that ultimately became the New Jersey Arbitration Law makes clear that a "controversy thereafter arising out of the contract or the refusal to perform" the contract is actually a narrow category of controversies.[179] The statement notes that the bill's purpose, with respect to predispute arbitration provisions, was "to make a clause in a contract providing for arbitration of controversies arising thereunder valid, enforceable and irrevocable just as any other clause of the contract."[180] The drafters of the legislation considered only controversies "arising thereunder" (i.e., arising under the contract) to be within the scope of the statute.[181] As noted earlier, the Supreme Court described the phrase "arising under," when used in an arbitration provision, to be "relatively narrow."[182]

The choice of the New Jersey version over the New York version is quite telling. In *Hall Street Associates, LLC v. Mattel, Inc.*, the Court made much of the fact that when it came to the judicial review of the decisions of arbitrators, Congress selected the approach of the New York Arbitration Law and not the different approach of the Illinois Arbitration and Awards Act.[183] Given that the FAA is largely based on the New York Arbitration Law,[184] the

176. *Id.* § 1.

177. *Compare id.*, *with* 9 U.S.C. § 2 (2006). The FAA, as previously noted, applies to written provisions in interstate contracts or maritime contracts to settle by arbitration "a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof." 9 U.S.C. § 2.

178. *See* New York Arbitration Law § 2 (1920), *reprinted in* A TREATISE ON COMMERCIAL ARBITRATION AND AWARDS, *supra* note 16, at 92 (current version at N.Y. C.P.L.R. § 7501 (CONSOL. 2007)).

179. S. 58, 147th Leg. (N.J. 1923).

180. James B. Boskey, *A History of Commercial Arbitration in New Jersey*, 8 RUTGERS-CAMDEN L.J. 284, 286 n.15 (quoting S. 58).

181. *See id.*

182. *See supra* note 157 and accompanying text.

183. 552 U.S. 576, 589 n.7 (2008).

184. *Id.* (citing S. REP. NO. 68-536, at 3 (1924)).

choice to deviate from the New York Arbitration Law and to follow the New Jersey version is even more telling than the choice described in *Hall Street Associates*.

B. *Legislative History and Early Commentary*

The legislative history of the FAA and early commentary on the FAA strongly support the conclusion that Congress intended the statute to apply only to the arbitration of claims arising out of contractual obligations. The Senate Report, for example, describes the state of the law that the FAA was designed to correct as follows: "[I]f an action at law were brought *on the contract containing the agreement to arbitrate*, [the arbitration] agreement could not be pleaded in bar of the action."[185]

Additionally, during the debate in the House of Representatives, the chairman of the House Committee, Representative Mills (who was also a sponsor of the legislation),[186] was asked to explain the bill.[187] He responded as follows: "This bill provides that where there are commercial contracts *and there is disagreement under the contract*, the court can force an arbitration agreement in the same way as other portions of the contract."[188] Congress apparently had in mind disputes about the contract itself, not a broader range of controversies.

Alexander Rose of the Arbitration Society of America, New York City, testified at the joint hearings before the relevant subcommittees of the House and the Senate that the FAA was designed to correct "the fact that the courts held right straight along that it was not competent for parties to agree on an arbitration of an entire controversy."[189] Rose continued, making clear that the "entire controversy" was comprised of liability under the contract in which the arbitration provision was contained:

> They [the parties to a contract] could agree [to arbitration] upon some incidental features—whether some work on a building contract had been properly performed; whether a payment was due; whether some matter of value was to be determined as an incidental matter,

185. S. REP. NO. 68-536, at 2 (1924) (emphasis added).

186. Piatt, *supra* note 17, at 153.

187. 65 CONG. REC. 11,080 (1924).

188. *Id.* (emphasis added).

189. *Joint Hearings*, *supra* note 14, at 25 (statement of Alexander Rose, Arbitration Society of America).

> but the question of liability under the whole contract was one which the courts assumed to take away from the parties.[190]

Commentary contemporaneous with the passage of the FAA bears out the proposition that the FAA was designed to cover controversies arising out of the private orderings of the party. Julius Henry Cohen, who served as general counsel for the New York State Chamber of Commerce[191] and who was a principal drafter of the FAA,[192] observed in a law review article published shortly after the passage of the FAA: "Not all questions arising out of contracts ought to be arbitrated. It is a remedy peculiarly suited to the disposition of the ordinary [business] disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like."[193]

The article noted that some of the "simpler questions of law" were also appropriate for arbitration—"the passage of title, the existence of warranties, or the questions of law which are complementary to" the types of questions of fact already discussed.[194] All of the issues set forth in the article as appropriate for arbitration, whether questions of fact or questions of law and whether common law or statutory, relate squarely to contractual disputes.[195]

Other contemporaneous articles by leading scholars support the proposition that the FAA was designed to deal with breaches of the contract containing the arbitration provision. In a 1931 article that has been described as the "most comprehensive study of the [FAA] in its early years,"[196] the authors note the confusion about the FAA that arose "from the fact that the arbitration contract itself creates a right to a particular remedy for breach of the main contract, which remedy, if pursued to judgment affirming the award, extinguishes rights on both contracts."[197] A "breach of

190. *Id.*

191. *Id.* at 13 (statement of Julius Henry Cohen, General Counsel, New York State Chamber of Commerce).

192. Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 589 n.7 (2008) (describing Cohen as "one of the primary drafters of both the 1920 New York Act and the . . . FAA").

193. Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926).

194. *Id.*

195. *See id*. at 278–86.

196. MACNEIL, *supra* note 22, at 126.

197. Baum & Pressman, *supra* note 17, at 458.

the main contract" is apparently the matter to be arbitrated.[198] Similarly, a leading treatise from 1930 on arbitration law notes that "it seems clear that [Section 2 and other similar provisions in state arbitration laws] do not embrace an agreement to arbitrate a future dispute unless that dispute is such as shall arise between the parties with respect to some general contract existing between them."[199]

It seems clear that Congress had in mind that a comparatively narrow range of controversies—only those involving contract claims—would fall within the scope of the FAA.

C. *Critiquing the Inward Expansion*

The expansion of the FAA inward, as courts place the arbitration of controversies about the arbitration provision itself within the scope of the FAA, also raises many issues.

Section 2 covers "a written provision in any maritime transaction or [in] a contract [in interstate] commerce to settle by arbitration a controversy thereafter arising out of such contract."[200] What is meant by "such contract"? Arguably it is the contract containing the arbitration agreement (i.e., the contract which the arbitration provision is "in"). If so, this would mean arbitration under the FAA is not intended to cover disputes regarding the arbitration provision itself (i.e., validity, scope, or formation).[201]

It might seem strange to treat the arbitration provision and the "container contract" as separate, but this is common practice for the Court in its arbitration jurisprudence. The Court has made clear that for purposes of enforcement "as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract."[202] This "severability" doctrine is based on Section 2's language that makes written provisions to arbitrate enforceable without mention of the validity of the con-

198. *See id*.

199. A TREATISE ON COMMERCIAL ARBITRATION AND AWARDS, *supra* note 16, at 103.

200. 9 U.S.C. § 2 (2006).

201. *Cf*. Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. ___, ___, 130 S. Ct. 2847, 2862 (2010) (holding that an arbitration provision that covered disputes "arising under" a collective bargaining agreement did not cover a dispute over the ratification date of the agreement).

202. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445 (2006).

tract in which they are contained.[203] Thus, when a challenge is made to a part of the contract other than the arbitration provision, a court will separate the arbitration provision from the rest of the contract and enforce it under the FAA.[204] Indeed, the Court has recently noted that "in cases governed by the [FAA, the Court] must treat the arbitration clause as severable from the contract in which it appears."[205]

Further, Sections 3 and 4 call for judicial determination of controversies relating to the arbitration provision. Section 3 provides for a stay of litigation if the court determines the issues in litigation are "referable to arbitration under" the terms of the relevant agreement.[206] Section 4 provides for the court or the jury to determine issues relating to the "making" of the arbitration agreement.[207] These two provisions are not necessarily binding on state courts in the way that Section 2 is.[208] But they strongly suggest Congress assumed that disputes about the arbitration provision would be decided by courts, not by arbitrators.

Congressional intent in this regard is made clearer from the FAA's legislative history. For instance, in his testimony before the relevant congressional subcommittees, Julius Henry Cohen observed that a party resisting enforcement in the good faith belief that the arbitration agreement "does not bind him to arbitrate, or that the agreement is not applicable to the controversy, is protected by the provision of the law which requires the court to examine into the merits of such a claim."[209] Judicial determina-

203. Rent-A-Center, W., Inc. v. Jackson, 561 U.S. ___, ___, 130 S. Ct. 2772, 2778 (2010) (citing 9 U.S.C. § 2).

204. *Id.*

205. *Granite Rock Co.*, 561 U.S. at ___, 130 S. Ct. at 2857 (footnote omitted) (citation omitted).

206. 9 U.S.C. § 3 (2006).

207. *Id.* § 4.

208. At one point the Court indicated that Section 3 was binding on state courts. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 26 (1983) (noting that state courts as well as federal courts were bound to issue stays under Section 3). The Court later backed off of this a bit, noting that "we have never held that [Sections] 3 and 4, which by their terms appear to apply only to proceedings in federal court . . . are nonetheless applicable in state court." Volt Info. Scis. Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 477 n.6 (1989) (citing 9 U.S.C. §§ 3–4 (1988)).

209. *Joint Hearings*, *supra* note 14, at 35 (statement of Julius Henry Cohen, General Counsel, New York State Chamber of Commerce).

tions of the scope and existence of the arbitration agreement are built into the FAA.[210]

IV. ADDRESSING OBJECTIONS

This article has endeavored to establish that Congress intended the FAA to apply only to the arbitration of contract disputes arising under the agreement that contains the arbitration provision. Such a reading raises a number of possible objections that deserve to be addressed. For instance, it might be argued that "arising out of" and "relating to" are synonymous. Additionally, it might be argued that the federal policy favoring arbitration mandates the current broad scope for the FAA. Further, it may be that the reference in Section 2 to a controversy arising out of a "transaction" actually indicates a broad scope for the FAA. Finally, it might be argued that if courts were to take the language of the controversy limitation seriously the result would be a bifurcation of claims into arbitrable disputes that would proceed to arbitration and nonarbitrable disputes that would proceed to litigation. Each of these four objections are addressed in turn.

A. *"Arising out of" and "Relating to" Not Synonymous*

This article has made much of the fact that the "relating to" language found so frequently in arbitration provisions is not found in Section 2. Perhaps, it might be argued, "relating to" and "arising out of" are simply synonyms. They are not.

There is a fundamental difference between a controversy "arising out of" a contract or its breach, as stated in Section 2, and a controversy either "arising out of" or "relating to" such a contract. The "relating to" language found in so many arbitration provisions is not mere surplusage. If "relating to" were merely synonymous with "arising out of" then there would be no reason for

210. *See generally* David Horton, *The Mandatory Core of Section 4 of the Federal Arbitration Act*, 96 VA. L. REV. IN BRIEF 1, 3 (2010), http://www.virginialawreview.org/inbrief/2010/04/02/horton.pdf (arguing that Section 4 calls for court determinations of issues related to the making of the arbitration agreement).

parties to include both phrases.[211] The purpose of such language is clear—to make "any" and "all" disputes arbitrable.[212]

The term "relating to" is fundamentally different from the statutory language "arising out of." The definitions of these and similar terms in a number of dictionaries demonstrate the point. Inherent in most definitions of "arising" is the concept of "origination." So, for example, one dictionary defines "arise" as "to originate from a specified source."[213] Another defines it as "[t]o come into being; originate" or "[t]o result, issue, or proceed."[214] While "arise" and "arising" sound in the concept of issuing or originating, the word "relate" is much broader and requires not origination but mere connectedness. Thus, one dictionary defines "relate" as "to be in relationship" or "have reference" and "related" as merely "having relationship."[215] Another defines "relate" as "[t]o have connection, relation, or reference" and "relation" as "[a] logical or natural association between two or more things."[216] Thus, while a claim that "arises out of" a contract must originate in a contract, a claim that "relates to" a contract would merely need to be connected to it in some way.

A dictionary contemporaneous with the passage of the FAA, the 1933 edition of the *Oxford English Dictionary*, evidences these same differences in meaning between the words. This is the dictionary the Court looked to in *Allied-Bruce Terminix Cos. v. Dobson* in order to determine how Congress would have understood "involving commerce" as compared to "affecting commerce" at the time Congress enacted the FAA.[217] As in the more modern dictionaries, the word "arising" is defined in terms of origination. Thus, "arise" is defined in relevant part as "[t]o spring forth, as a river, from its source," "[t]o spring up, come into existence," or

211. *Cf.* 2 E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.11 (3d ed. 2004) (footnote omitted) ("[Contracts are] therefore to be read as a whole and an interpretation that gives effect to every part of the agreement is favored over one that makes some part of it mere surplusage.").

212. *See supra* text accompanying notes 74–75.

213. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 117 (Philip Babcock Gove et al. eds., 1993).

214. THE AMERICAN HERITAGE COLLEGE DICTIONARY 76 (Joseph P. Pickett et al. eds., 4th ed. 2002).

215. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 213, at 1916.

216. THE AMERICAN HERITAGE COLLEGE DICTIONARY, *supra* note 214, at 1173.

217. *See* 513 U.S. 265, 274 (1995); discussion *supra* Part I.C.2.

"[t]o spring, originate, or result *from*."[218] Similarly, "arising" is defined as "[s]pringing up, origination."[219]

In contrast, this dictionary defines "relation" as "any connexion, correspondence, or association, which can be conceived as naturally existing between things."[220] For things to be "related" they need only have a "mutual relation or connexion."[221] "Arising out of" and "relating to" are two very different concepts.

Some courts have noted the distinction between language "arising out of" and "relating to." For example, in *Tracer Research Corp. v. National Environmental Services Co.*, the court criticized a litigant for relying largely on cases interpreting arbitration clauses with "arising out of or relating to" language to argue for an expansive scope for an arbitration provision that did not include the "relating to" language.[222] The court noted that the "reliance on these cases is misplaced. The omission of the 'relating to' language is 'significant.'"[223]

Had Congress intended to include the "relating to" language in Section 2, it would have. The phrase "relating to" does appear elsewhere in the statute, apparently meaning "having something to do with." For example, Section 1 of the FAA defines "[m]aritime transactions" to include agreements "relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce."[224] The context shows a broad meaning for "relating to."

Similarly, in describing the effect of a judgment entered under the FAA, the statute provides that such judgment "shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action."[225] Once

218. THE OXFORD ENGLISH DICTIONARY 445–46 (photo. reprint 1976) (James A.H. Murray et al. eds., 1933).

219. *Id.* at 446.

220. *Id.* at 398.

221. *Id.* at 397.

222. *See* 42 F.3d 1292, 1295 (9th Cir. 1994).

223. *Id.* (quoting Mediterranean Enters., Inc. v. Ssangyong Corp., 708 F.2d 1458, 1464 (9th Cir. 1983)). *But see* Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l Ltd., 1 F.3d 639, 642 (7th Cir. 1993) ("[W]e do not believe that adding 'relating to' to 'arising out of' substantially broadens the scope of the clause . . . ."); Simitar Entm't, Inc. v. Silva Entm't, Inc., 44 F. Supp. 2d 986, 994–96 (D. Minn. 1999) (criticizing the distinction drawn by courts between "arising out of" and "relating to").

224. 9 U.S.C. § 1 (2006) (internal quotation marks omitted).

225. *Id.* § 13.

again, "relating to" is used by Congress to essentially mean "having something to do with."

B. *The "Liberal Policy"*

Is a narrower scope for the FAA in conflict with what the Court has described as Section 2's "liberal federal policy favoring arbitration"?[226] After all, the Court has indicated that "questions of arbitrability must be addressed with a healthy regard" for that policy and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[227] This "liberal federal policy" does not require a scope for the FAA that is unmoored from the language of the FAA. The liberal federal policy is relevant to determining whether a given dispute is within the scope of an arbitration provision in a contract.[228] As the United States Court of Appeals for the Seventh Circuit recently noted, "[a]ny 'preference' for arbitration is reserved for the interpretation of the scope of a valid arbitration clause."[229]

Even in that situation, however, the policy does not mandate automatic inclusion if the language will not bear it. In *Granite Rock Co. v. International Brotherhood of Teamsters*, the Court considered whether a dispute about an agreement date of ratification was within the scope of an arbitration provision that covered disputes "arising under" the agreement.[230] The Court held that the "presumption favoring arbitration [could not] cure" the fact that the dispute was beyond the provision's scope because the dispute went to the very existence of the contract and so could not be said to arise under it.[231]

Moreover, it is unclear how, or even if, this prescription to consider the pro-arbitration policy in deciding questions of arbitrabil-

226. AT&T Mobility LLC v. Concepcion, 563 U.S. ___, ___, 131 S. Ct. 1740, 1745 (2011) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)) (internal quotation marks omitted).

227. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25.

228. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) (indicating that the federal policy in favor of arbitration dictates that doubts concerning the scope of arbitrable issues be resolved in favor of arbitration).

229. Janiga v. Questar Capital Corp., 615 F.3d 735, 740 (7th Cir. 2010) (citing AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649–50 (1986)).

230. 561 U.S. ___, ___, 130 S. Ct. 2847, 2862 (2010).

231. *Id.* at ___, 130 S. Ct. at 2862.

ity (a prescription the Court has described as "vague")[232] should be applied to a question of statutory interpretation. The Court's jurisprudence on the scope of the FAA in interstate commerce is instructive. In *Allied-Bruce Terminix Cos. v. Dobson*, the Court considered the appropriate breadth of the statute to determine to what range of interstate transactions Section 2 applied.[233] Interestingly, although the Court had many bases for reading the language of Section 2 broadly, it did not mention the "liberal federal policy" in favor of arbitration in its determination. This supports the conclusion that the liberal federal policy may not be particularly relevant to determining the scope of the statute itself.

More fundamentally, though, even a liberal policy favoring arbitration cannot overcome the actual language of the statute (as fleshed out by its legislative history). A liberal federal policy could not lead to a reading that eliminated or modified the requirement that an arbitration provision be in writing to trigger enforcement under Section 2.[234] Nor can a liberal policy expand the FAA beyond the types of controversies set forth in Section 2.

C. *Not That Kind of Transaction*

Another possible objection to this article's argument about the scope of the FAA might be that the FAA applies, according to Section 2, to agreements to arbitrate controversies arising out of certain contracts or "transaction[s]."[235] That is, Section 2 makes enforceable "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce . . . thereafter arising out of such contract *or transaction*."[236]

This might lead one to conclude that Congress intended a fairly broad scope for the FAA because a "transaction" is generally considered much broader than a mere "contract." A leading law dictionary defines "transaction" as the "act or . . . instance of conducting business or other dealings."[237] If the FAA applies to an agreement to arbitrate a controversy arising out of the underlying

232. Arthur Andersen LLP v. Carlisle, 556 U.S. ___, ___, 129 S. Ct. 1896, 1902 n.5 (2009).

233. 513 U.S. 265, 268 (1995); s*ee also* discussion *supra* Part I.C.2.

234. *See* 9 U.S.C. § 2 (2006).

235. *Id.*

236. *See id.* (emphasis added).

237. BLACK'S LAW DICTIONARY 1635 (9th ed. 2009).

"transaction," broadly defined, then the scope of the FAA would extend beyond mere contractual disputes.

But the FAA is not referring to "transaction" in the broad sense. The ambiguity flows from the fact that Section 2 actually uses the word "transaction" three times with two different meanings. The FAA covers "[a] written provision in any maritime *transaction* or a contract evidencing a *transaction* involving commerce to settle by arbitration a controversy thereafter arising out of such contract or *transaction*, or the refusal to perform the whole or any part thereof."[238]

The FAA's legislative history includes some discussion of the ambiguity of the word "transaction." During the Senate debate over the bill that became the FAA, Senator Caraway expressed some concern about the way the word "transaction" was used in Section 2. Addressing Senator Sterling, who was one of the sponsors of the bill,[239] Senator Caraway stated:

> I was going to suggest to the Senator that the language, "a written provision in any maritime transaction or a contract evidencing a transaction," would seem to be rather remarkable . . . . I take it that a transaction is something we do and I do not see how there could be such a thing as "a written provision in an act" that we do.[240]

He continued, noting that "a transaction is an act, it is something people do, and it is not a written contract."[241] Senator Sterling replied that he was "quite content to leave [sic] the language stand as it is."[242] Senator Caraway responded as follows: "Should that be done, it would certainly be a monument to the Senator. I am perfectly willing for him to erect it."[243]

The ambiguity that Senator Caraway raised is easily cleared up. It is possible that Senator Caraway had in mind an earlier version of the statute in which there was indeed a reference to a written provision being in an interstate transaction.[244] But the

238. 9 U.S.C. § 2 (emphasis added).

239. Piatt, *supra* note 17, at 153.

240. 66 CONG. REC. 2761 (1925) (statement of Sen. Caraway).

241. *Id.*

242. *Id.* (statement of Sen. Sterling).

243. *Id*. at 2762 (statement of Sen. Caraway).

244. Section 2, in an earlier version under consideration, referred to "a written provision in any contract or maritime transaction or transaction involving commerce." H.R. 646, 68th Cong. § 2 (1924), *reprinted in Joint Hearings*, *supra* note 14, at 3 (as passed by the House of Representatives and referred to the Senate Commerce Committee, June 7, 1924).

FAA, as adopted, does not contain any ambiguity. There is no ambiguity or problem with a reference to a written provision being in a "maritime transaction" because the term "maritime transaction" is specifically defined in Section 1 of the FAA as a maritime contract. Maritime transactions are defined as "charter parties, bills of lading of water carriers" as well as all manner of agreements, such as those "relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce" that would be within the admiralty jurisdiction.[245]

To be sure, Section 2 also references a second type of "transaction."[246] Section 2 refers to a provision in a contract "evidencing a transaction" in interstate commerce, and this is clearly something different from and broader than the "maritime transaction."[247] So, when the statute refers to a controversy "arising out of such contract or transaction," does it mean the narrow "maritime transaction" or the broader interstate transaction?

It means the narrower type of transaction—a maritime transaction. The reference to "such contract or transaction" almost certainly parallels the reference to the written arbitration provision being in either a contract in interstate commerce or a maritime transaction.[248] The "transaction in commerce" simply describes the type of contract that is referenced (i.e., "such contract" is a contract that evidences a "transaction in commerce"). If "such . . . transaction" meant the transaction in interstate commerce, then there would be no reference to controversies arising from the maritime transaction, even though Congress obviously intended to include such controversies within the scope of the FAA. Finally, the FAA speaks of a failure to "perform" the contract or transaction in whole or in part.[249] It is far more natural to speak of failing to perform a contract or agreement than of failing to perform a "transaction" (i.e., an "act or instance of conducting business or

245. 9 U.S.C. § 1 (2006).
246. *See id.* § 2.
247. *Compare id.*, *with id.* § 1.
248. *See id.* § 2.
249. *Id.* § 1.

other dealings").[250] The narrower "maritime transaction" must be what Congress intended here.[251]

The Court's recent opinion in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* leaves little doubt that "such transaction" refers to a maritime transaction.[252] In that case, the Court noted that "the FAA provides, in pertinent part, that a 'written provision in any maritime transaction' calling for the arbitration of a controversy arising out of such transaction" shall be enforceable, making clear that "such" transaction is the maritime transaction.[253]

D. *Bifurcation: A "Misfortune," Not a Catastrophe*

Finally, some might take issue with one of the practical effects of this article's argument, namely that adhering to the language of Section 2 will result in the bifurcation of actions into arbitrable parts that will proceed to arbitration and nonarbitrable parts that will be subject to litigation. While such bifurcation is admittedly not ideal, it is also not as problematic as it might seem at first. As one court has noted, when it comes to the FAA "there most clearly is not" a policy evincing the avoidance of piecemeal litigation.[254]

At least two Supreme Court cases demonstrate that, while bifurcation is a legitimate concern, it is not an overriding one. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Court was faced with a scenario in which a hospital had asserted claims against both a general contractor and an architect.[255] While the contractor had agreed to arbitration, the archi-

250. BLACK'S, *supra* note 237, at 1635.

251. One might wonder why the reference is to "such contract or transaction" instead of "such transaction or contract." After all, earlier in Section 2 the reference to the transaction comes first. This is presumably a vestige from an earlier draft version of the statute in which the reference to the contract preceded the reference to the transaction. The original version of Section 2 referred to a written provision "in any contract or maritime transaction or transaction involving commerce." H.R. 646, 68th Cong. § 2 (1924), *reprinted in Joint Hearings*, *supra* note 14, at 3.

252. 559 U.S. ___, ___, 130 S. Ct. 1758, 1773 (2010).

253. *Id.* at ___, 130 S. Ct. at 1773 (quoting 9 U.S.C. § 2 (2006)).

254. Answers in Genesis of Ky., Inc. v. Creation Ministries Int'l, Ltd., 556 F.3d 459, 467 (6th Cir. 2009).

255. 460 U.S. 1 (1983).

tect had not.[256] Thus, granting the contractor's request for arbitration would result in piecemeal litigation—claims against the contractor would be arbitrated, and claims against the architect would be subject to litigation.[257] Although such bifurcation represented a "misfortune," it did not override the language of the FAA, which called for the enforcement of the arbitration agreement between the hospital and the contractor.[258]

Similarly, in *Dean Witter Reynolds Inc. v. Byrd*, the Supreme Court addressed the question of how a court should proceed when faced with some claims that are arbitrable and some that are not.[259] Specifically, the Court addressed whether a court should refrain from compelling the arbitration of claims that were subject to arbitration in order to avoid the piecemeal resolution of the dispute.[260] The Court held that it was proper to proceed with arbitration for the arbitrable claims and litigation for the nonarbitrable claims.[261] Thus, concerns about bifurcation and piecemeal litigation could not override the intent of Congress (i.e., that claims which the parties had agreed to arbitrate and that are within the scope of the FAA be subject to arbitration).[262]

The Court in *Byrd* noted that the potential for bifurcation is actually built into the FAA in that the FAA does not require parties to arbitrate every possible claim.[263] Accordingly, bifurcation is a possibility every time parties agree to arbitrate only some types of claims. Bifurcation cannot be said to contradict the intent of Congress.[264] In fact, it is the position of this article that not only would such bifurcation not frustrate congressional intent, it would actually effectuate it.

256. *Id*. at 19–20.

257. *Id.* at 20.

258. *Id.*

259. 470 U.S. 213, 214 (1985). This case was decided before it had been made clear that federal securities claims could be subject to arbitration and thus addressed a situation in which some claims were arbitrable while the federal securities claims were not. *Id.* at 215–16 & n.1.

260. *See id.* at 218.

261. *Id*. at 217.

262. *See id.* at 221.

263. *Id*. at 219.

264. *See id*.

V. CONCLUSION

Jurisprudence on the scope of the FAA's controversy limitation has focused on the language of the arbitration provision and the competence of arbitrators to resolve various types of disputes. What has been missing from this analysis is a meaningful consideration of the actual language of the FAA. This article has sought to expose that state of affairs and the Supreme Court's curious deferral to the language found in private arbitration provisions. Not only has the Court ignored the language of the FAA, but ignoring that language has led to a very different FAA from the one Congress envisioned or intended. This article urges a renewed focus on the language of the statute as a means of restoring the balance Congress struck in passing the FAA.